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ABSTRACT

This report reviews the literature on sentence disparity and considers the advisability of additional efforts to provide more equality throughout the criminal justice system. Definitions of disparity are said to include: (1) differences between individual judges; (2) differences between comparable defendants; (3) differences between categories of offenses; (4) differences between regions and circuits; and (5) differences between courts of various levels. Civil rights issues in sentencing which include racial, sex, or class discrimination are also discussed along with measures for reform. Suggested reforms include the limitation of judicial discretion, the use of sentencing guidelines, panels or reviews, presentencing services, and improved communication between judges and correctional authorities. The report concludes that although the extent and causes of sentence disparity are unknown in many cases, it is certain that the United States Commission on Civil Rights has the authority and responsibility to take action with intent to resolve this issue. (JCD)

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SENTENCE DISPARITY AND CIVIL RIGHTS

Submitted to the

U. S. COMMISSION ON CIVIL RIGHTS

by

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PREFACE AND ACKNOWLEDGEMENTS

This is a working paper commissioned by the U. S. Commission on Civil Rights to help them consider the advisability and feasibility of additional effort on the issue of disparate sentencing. Therefore, it is written in a relatively informal style, for it is intended to be a readable summary of what is known and thought about sentence disparity.

Louis Nunez, Gene Mornell and Richard Baca of the U. S. Commission on Civil Rights launched this endeavor and provided the initial intellectual spark.

Acknowledgements are due to all those who contributed time, energy and wisdom to the development of this paper. They include Professors Lee Abramson, Abraham Blumberg, Martin Golding, Lloyd McCorkle, Arthur Niederhoffer, Alex Smith, and Franklin Zimring. Meetings with representatives of several groups such as the National Council of La Raza, the Urban League, the Fortune Society, Aspira of America, and the National Council on Crime and Delinquency were most helpful. Drew Days, Assistant Attorney General for Civil Rights, was kind enough to share his thoughts as were John Huerto and Lani Guinier of his office, Gil Pompa and Bertram Levine of the Community Relations Division of the Department of Justice, and Howard Glickstein of the OMB Taskforce on Civil Rights Reorganization. Those judges who shared their ideas anonymously gave help without any promise of recognition. Andrea Silverman of New York University Law School, and Walter Strauss and Ignatius Adanga of John Jay College helped in compiling source materials. Helen Ossen helped both in the organization of this paper and in its final typing.

Without undue disparity, I thank them all and absolve them from responsibility for any errors or shortcomings that I may have included in this report. My readers are also asked to overlook the fact that sometimes referring to a judge or a defendant, the reference is to "he." There is no sexism intended and certainly no discriminatory sexism.

Charles Bahn

New York

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For at least the past thirty years, sentence disparity has been identified as a major problem in the administration of criminal justice (Andenaes, 1966; Berger, 1977; Blumberg, 1967; Cargan & Coats, 1974; Chandler, 1965; Frankel, 1973; French, 1974; Gaudet, 1949; Green, 1961; Goldstein & Goldstein, 1971; Hewitt, 1976; Hoffman, 1968; Howard, 1975; Kennedy, 1976; Levi, 1949; Mannheim, 1958; McKay, 1976; Nagel, 1965; Orland, 1975; Von Hirsch, 1976; Wilkins & Chandler, 1965; Winick, Gerver & Blumberg, 1961; Youngdahl, 1965; Zumwalt, 1973). While much of the specific attention has been concentrated on disparities in sentence of the death penalty (Singer, 1976) or in rape cases (Brownmiller, 1969), there is widespread feeling that the possibility that different sentences will be meted out to individuals convicted in essentially the same situations affronts the general understanding of what we mean by justice. Beyond this, there is some feeling, backed by fragmentary evidence, that within chance disparity, there may be outright discrimination.

Sentence disparity has also been acknowledged as an international problem. A paper written by the United Nations Secretariat in 1965 stressed that:

"In most countries there is, admittedly, a varying degree of disparity and inconsistency in the sentencing process and this tends to engender disrespect and even contempt for the law."

How disparate is sentencing in our country? The immediate answer is that we don't really know because we have never undertaken a comprehensive study of courts at all levels to find out. What we have instead are strong impressions, intuitive generalizations, and a somewhat confusing array of local, statewide and districtwide studies that indicate the existence of an intolerable level of disparity in sentencing, more than can be justified by all the conventional explanations that are currently offered. This is true even of the Federal Court System, although this system obviously accounts for only a very small proportion of those convicted and incarcerated.

Definitions

Unfortunately, much of the discussion of this topic has proceeded on the simplistic assumption that sentence disparity is a readily recognizable and clearly undesirable phenomenon. The problem, however, is much more complex, and reasonable men differ not only on what can and ought to be done about sentence disparity, but also on whether it is desirable, on how much of it exists, and how significant it is in the broad context of the criminal justice system.

To begin with, there is the matter of definition of sentence disparity. Whitney North Seymour (cited in Orland & Tyler, 1974) wrote that disparity exists on at least five levels.

One is the disparity between individual judges, the fact that there is one judge who essentially does not impose prison sentences and another judge who does tend to impose prison sentences, and the fact that throughout (the prison system) everybody knows that if he is before Judge So and So, the chances, when he is convicted, of going to jail are much greater than they are before another judge. . . . This is one form of disparity.

Another form of disparity is for those defendants who are convicted of the same offense and with essentially the same factors present, the difference in the terms of the sentence they may get. . . . Inmates at Attica could realize that they were serving several years longer than somebody else who was convicted of the same kind of violation. . . .

The third kind of disparity is between offenses. That is, a different philosophy manifested in the sentencing process, that if you commit one kind of crime, it is a much more evil violation in terms of the punishment you get than another kind of crime. . . . Essentially, one pattern came out that it is the so called white collar kind of violation that tends to get what might be defined as a slap on the wrist, whereas it is the common criminal who tends to be the one who goes to jail. . . .

The fourth yardstick of disparity is . . . between geographical areas. It is absolutely appalling to look at reports . . . on the basis of sentences (in the federal courts) from different districts and different circuits around the country. . . . The overall impression is one that many of us know viscerally that if you are caught in a certain part of the country you are going to get a much heavier sentence than if you are caught in another part of the country. . . .

The fifth area is the disparity . . . between the federal system and the state system. . . . For certain types of violations . . . which court a man is going to be prosecuted in

(will determine) . . . whether he is more likely or less likely to get a heavier sentence, in the state court or the federal court, on the same basic set of facts.

Seymour described disparity between judges, between comparable defendants, between categories of offenses, between regions and circuits, and between courts of various levels. He also went beyond differences in the length of sentence meted out, and dealt with disparity deriving from whether a prison sentence is given or some other disposition is made.

Of the disparities described, some are inevitable. Different states have different statutes covering the same offenses. Therefore, someone caught in one state will receive a different sentence than someone caught in another state committing the same offense.

Rational vs. Irrational Disparity

Outside of disparity deriving from differing statutes, where does the remaining disparity come from? It can be divided between what has been termed "irrational" disparity and what must be considered "rational" disparity.

Rational disparity is based on the doctrine expressed by the Supreme Court Williams v. New York, 337 W. S. 241, 247 (1949) that the punishment should fit the criminal as well as the crime. Such an approach, it was postulated, would permit an effective mode of rehabilitation to be individually tailored to each offender. The court could make a judgment of the dangerousness or threat that each offender represented

to the community. In each case, the court could best serve the purposes of retribution, incapacitation, rehabilitation, general deterrence and specific deterrence by taking into account the specific characteristics of the defendant, the time when the offense was committed, the social setting of the crime, and norms of the local community regarding the offense.

While there are parts of this argument that are open to serious question, and it is not clear that it is a defensible position, nevertheless it is important to bear in mind that recent pronouncements of the Supreme Court suggest that differential sentencing would be assessed under the loose equal protection standard to determine whether it couldn't "be shown to bear some rational relationship to legitimate (governmental) purposes." San Antonio Independent School District v. Rodriguez, U. S. 93 S. Ct. 1278, 1284 (March 21, 1973). Constitutionally speaking, therefore, it appears that it is irrational disparity that is invalid.

Sources of Irrational Disparity

How does irrational disparity enter the picture? Irrational disparity comes from human weaknesses of the participants in the courtroom --the personality, mood and temperament of the judge, the prosecutor, or the probation officer. The judge, in attempting to utilize the "voice of the community" (Smith and Pollack, 1972) as a basis for sentencing must rely on inferences from local press, radio

or television, from casual contacts with citizens, speeches by local politicians, pleading of special interest group representatives, or even from correspondence from those writing to the judge and claiming not to be involved in the specific case. Not only are these sources random, but they may also be heavily biased and unrepresentative.

The presentence report of the probation officer has been identified as highly influential (Carter, 1969; Carter & Wilkins, 1976) or moderately influential (Dressler, 1969; Tappan, 1960) and has been alternately praised as most helpful (Tyler, 1976) and criticized as, at times, sheer gobbledygook (Blumberg, 1967) or biased (Smith & Berlin, 1974). Whatever the case, it is obvious that the training, judgment, perspicacity and fairness of the probation officer affect the sentencing decision, for the presentence report and its use are potential sources of both rational and irrational bias.

Some scholars have insisted that the role of the prosecutor in influencing the sentencing decision is considerable (Teitelbaum, 1972) and others have argued for an expanded role for defense attorneys (Dash, 1972; Miller, 1972). If so, the variability in personalities and predelictions of the lawyers in a given case plays a significant part.

Disparity also arises because of a lack of communication between judges concerning the goals and desiderata of sentencing. It is not uncommon for judges sitting in the same courthouse to hand out alarmingly different sentences in what appear to be very similar situations. The National

Advisory Commission on Criminal Justice Goals and Standards, Report on Corrections suggests that "at least some dialogue should be initiated between judges within the same jurisdiction to address some of the variables and factors contributing to certain of the more harmful discrepancies of the sentencing process."

The same report also draws attention to the lack of communication between sentencing courts and the correctional system and the insularity engendered thereby. More shocking, it identifies random ignorance of sentencing alternatives as a cause of discrepancy. "A survey of Federal court judges made shortly after the passage of laws authorizing the use of new alternatives revealed that many were not familiar with these options. As familiarity increased, so did use, and disparity between dispositions by judges who had been cognizant of these possibilities and those who had not decreased sharply."

Another source of irrational disparity is noted in the commendable, but thus far, ineffectual attempt to identify the individual who represents a danger to society in his potential for violence. As Wilkins pointed out in his remarks to the 1974 Sentencing Institute for the First and Second United States Judicial Circuits (Orlando & Tyler, 1974) "We are still waiting for a breakthrough in the prediction of violence. At the present time, we still have too many false positives." False positives are those individuals who are predicted to be violent who, in fact, do not act in

this way. Monahan (1976) reviewed the studies attempting to predict violence and reached the same conclusion. "The last few years have witnessed a remarkable increase in the number of experimental and naturalistic studies aimed at validating the ability of behavioral scientists to predict violence . . . every study has led to similar conclusions . . . violence is overpredicted." Judges, too, apparently make this type of error, for they identify the protection of society from possible danger as one of the goals of sentencing. Clearly, too, some irrational disparity derives from the constantly changing philosophy of sentencing that is prevalent. Judges of different ages and backgrounds must encounter different expressed philosophies. The historical perspective shows that sentencing during the Colonial period and thereafter was viewed as an alternative to the gallows, and for the purpose of specific deterrence. Therefore, sentences were very long and unvariant. In the 1820's a second stage developed, in which the ethic of rehabilitation based on rigid, disciplined prison routines emerged. Sentences declined somewhat, but were still very harsh and very long. In the post 1870 period, the slow ad hoc growth of mechanisms moving away from lengthy sentences appeared. The fourth stage, the system that we are now in, emerged during the first decade of this century. It is characterized by the use of probation, parole and indeterminate sentencing. This both expanded discretion and diffused responsibility. Within the past ten years

disillusion with this system and its philosophies have begun to reappear among the old and to emerge as reform among the young.

Approaches to the Measurement of Sources of Disparity

On a somewhat theoretical plane, there are those who believe that it is possible to do a careful analysis of all of the factors cited above and ultimately determine the proportional contribution of each of them to the final sentencing decision. There are others, most notably Gaylin (1974), who insist that statistical and actuarial studies can only give us an approximate that derives from all cases but it is true in no single case. They say that statistical descriptions are like the depiction of the average American family as having 1.8 children, an abstraction with no possible correlate in the real world. With regard to sentencing, they believe that the complex of interacting factors that results in any single sentence occurs but once in time, although they would admit that a major contribution to this constellation comes from the unique approach and philosophy of each sentencing judge. Thus, Gaylin (1974) in searching for the causes of sentence disparity, interviewed individual judges about their philosophies of justice, crime, and punishment. This general dispute closely parallels an argument that has long prevailed in the study of personality between those who adopt the nomothetic view of laws deriving from

wide-scale studies and those who hold the idiographic view of unique individuality (Allport, 1961).

Whichever position one takes, it is clear that personality variables are significant sources of disparity, particularly in the case of the judge. Unless the judge comes to the bench with a background in sentencing, there are few resources available that provide guidance with regard to this function. Unlike his continental counterparts, an American judge receives little or no specific formal training for his role. The curricula of most law schools do not contain much that will specifically prepare a newly appointed sitting judge for his work, and thus he must fall back on an "intuitive understanding of the requirements of sentencing" (Winick, Gerver & Blumberg, 1961).

This situation is exacerbated by the fact that the federal law, and most state laws, do not specify the goals of the sentencing process (Frankel, 1972). At present, judges are not required, in most cases, to identify the purpose, philosophy or goal of a given sentence, thus depriving their colleagues of guidance, not to speak of the ambiguity created for penal authorities and parole boards.

Civil Rights Issues in Sentence Disparity

Within existing irrational disparity in sentencing are there civil rights issues that require attention? An analysis of the Civil Rights Act of 1975 would suggest that the answer must be affirmative, if irrational disparity can be shown to exist.

In a memorandum by Richard Baca (1977) General Counsel of the United States Commission on Civil Rights, the following duties are understood to have been imposed on the Commission by Section 104(a) of the Civil Rights Act of 1957, as amended:

1. To study and collect information regarding the denial of equal protection of the laws because of race, color, religion, sex or national origin or in the administration of justice;

2. to appraise the laws and policies of the Federal Government with regard to denials of equal protection of the laws because of race, color, religion, sex or national origin or in the administration of justice; and

3. to serve as a national clearinghouse for information in respect to denials of equal protection of the laws because of race, color, religion, sex or national origin or in the administration of justice.

In the three places where the term "administration of justice" is used, it appears as a separate jurisdictional grant limited by the term "equal protection of the laws" but not limited by the phrase "because of race, color, religion,

sex or national origin." While the legislative history of these provisions is scant, it is clear that Congress intended the the Commission examine issues relating to the administration of justice whether or not the issues involve race, color, sex, religion or national origin. Commenting on the 1964 amendments to the Civil Rights Act, Senator Hubert Humphrey, the floor manager of the Civil Rights Act of 1964, stated:

"Basically, as the amendment indicates, there are denials of equal protection because of race, color, religion or national origin and denials of equal protection in the administration of justice, whether or not related to race, color, religion or national origin. 110 Cong. Rec. 12288 (June 4, 1964)."

Commission memoranda on the scope of our administration of justice jurisdiction have consistently concluded that we are authorized to inquire into any denial of equal protection in the administration of justice, whether or not the denial is based on one of the enumerated categories.¹

In defining the term "equal protection of the laws," an appendix prepared for the Commissioners' March 20, 1960 meeting² as a part of the statement entitled "The Scope of the Authority of the Commission on Civil Rights Under Section 104(a) of the Civil Rights Act of 1957," adopted by the Commissioners on May 26, 1960, asserts that:

1. See memorandum of March 20, 1960, entitled "Appendix B: Aspects of the Commission's Jurisdiction"; memorandum of Nov. 20, 1960 by John Ulfelder, Asst. General Counsel; memorandum of March 31, 1971 by John H. Powell, Jr., General Counsel, and memorandum of Aug. 12, 1971 entitled "The Scope of the Commission's Jurisdiction."

2. See "Appendix B: Aspects of the Commission's Jurisdiction."

"Two propositions are basic in any consideration of the Commission's jurisdiction. One is that the Commission's jurisdiction goes at least as far as the court decisions interpreting the equal protection clause of the Fourteenth Amendment. This is obviously so because the Commission's jurisdiction in every field save voting turns upon 'the equal protection of the laws' . . . and because, as Senator Eastland stated in debate on /the/Act, 'equal protection of the laws' means what the courts have interpreted it to mean. . . . The other general observation is that the Commission's jurisdiction extends beyond the scope of specific court decisions condemning specific violations of the equal protection clause . . . to the general prohibition against discrimination which is expressed by that clause.

Therefore, the Commission can collect and assess facts to determine whether there has been a denial of equal protection in the administration of justice without waiting for a court to examine the propriety of the challenged governmental conduct.

The only qualification of our authority to examine into denials of equal protection in the administration of justice which appears in previous memoranda is that "equal protection of the laws" refers to the activities of judicial, law enforcement and correctional officials in administering the law and not to the validity of the underlying law.³ For example, while the Commission could legitimately examine into such matters as brutality during arrest, bail, and confinement conditions pursuant to its administration of justice jurisdiction, it would not have authority to consider the constitutionality of the statute under which a class of defendants was charged.

3. See memorandum of John H. Powell, Jr., General Counsel, March 31, 1971.

Nevertheless, so long as the Commission's inquiries are restricted to matters of procedure rather than to substantive challenges to a particular law or ordinance, prior interpretations of our administration of justice jurisdiction enable us to examine the disparate treatment of any class of individuals by the judicial system (whether the civil⁴ or criminal branch), law enforcement agencies or corrections institutions.

The Commission, in its past activities in the area of the administration of justice, has affirmed these broad interpretations by the Commission staff. It has not limited its inquiry to denials of equal protection based on race, color, religion, sex or national origin. The Commission has conducted investigations and held hearings regarding police/community relations in 18 communities. While their focus was usually the treatment of minorities by the police, the inquiries did not exclude the impact of police misconduct on other segments of the communities. Likewise, the 13 prison studies done by the Commission's State advisory committees addressed the problems of prisoners as a distinct class rather than confining the studies to the problems of racial, ethnic or religious minorities within the prisons.

Nor has the Commission limited itself to studies of the criminal justice system. Volume 5 of the Statutory Report for 1971 deals with the exclusion of minorities from jury service. The Virginia State Advisory Committee conducted a study and issued a report on the selection of judges in the state of Virginia.

Although the term "administration of justice" is not defined in the statute or in its legislative history, the work of the Commission reveals the following definition: the Commission's administration of justice jurisdiction encompasses issues of the denial of equal protection in judicial (both civil and criminal), law enforcement and corrections activities, and includes all stages of the judicial process (e.g., bail, arrest, conduct of trial, imprisonment, probation, parole).

4. Id.

Beyond the specific charges of the U. S. Commission on Civil Rights, it is important to consider in a somewhat broader perspective the constitutional bases for attacking discriminatorily applied sentences.

I. The Constitutional Bases for Attacking Discriminatorily Applied Sentences

A. The Eighth Amendment

The ban on cruel and unusual punishments imposed by the Eighth Amendment has been used only sparingly in criminal sentences. (See Berger, *Equal Protection and Criminal Sentencing: Legal and Policy Considerations*, 71 NW. U. L. Rev. 29 (1976). It has been held to apply to the imposition of excessive punishments in Weems v. United States, 217 U. S. 349 (1909). and it has been described as "drawing its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U. S. 86, 101 (1958). In a California case, the supreme Court of California held that an indeterminate sentence of up to life for indecent exposure violated the Eighth Amendment. In Re Lynch, 503 P. 2d 921 (1972). The Eighth Amendment is generally used only to invalidate excessive or disproportionate sentences, as in the cases above, and has not been applied to the problem of disparity. In the Death Penalty cases, however, the Court held that statutes which allowed for arbitrary imposition of the death penalty were invalid. An Eighth Amendment challenge to disparity in a non-capital offense could possibly be made on the

basis of those cases, but it would be difficult.

B. Substantive Due Process

Under the notion of substantive due process the Constitution protects "fundamental interests" and basic liberties. In Skinner v. Oklahoma, 316 U.S. 535 (1942), the Supreme Court invalidated an Oklahoma statute providing for compulsory sterilization after a third conviction for a felony "involving moral turpitude," but excluding felonies such as embezzlement. Though state classification of crimes would not ordinarily be overturned, the Court held that usual deference to state police power was not warranted here. "We are dealing here with legislation which involves one of the basic civil rights of man (procreation). He is forever deprived of a basic liberty." If the notion of the "basic liberties" to which we are all entitled would be expanded to include freedom from incarceration, or at least from incarceration imposed on discretionary and discriminatory bases, discretionary sentencing statutes might be deemed unconstitutional. The Court, however, has thus far failed to rule on substantive due process as it relates to punishment. See Ingraham v. Wright, 430 U.S. 651 (1977), holding that corporal punishment in public schools does not violate procedural due process, and not reaching the substantive due process issue.

C. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment offers an alternative approach to challenging the constitutionality of disparate sentences. The Supreme Court has generally

used two tests to determine whether a statute is violative of equal protection. If the classification which is being challenged has been deemed to be suspect (such as race) and the interest involved is a fundamental interest (such as the right to travel or to marry), then any state statute will be subject to "strict scrutiny" to determine whether there is a compelling state interest which is served by the discriminatory classification. In virtually all cases, the strict scrutiny test will not be met, and the statute will fall.

However, sentencing decisions have not yet been deemed to involve a fundamental interest. In cases where a fundamental interest is not involved, the Court applies only a "rational relationship" test, meaning that if the classification bears a rational relationship to the ends to be served by the statute, the statute will stand. These are the traditional equal protection tests and suggest that sentencing classifications challenged on equal protection grounds would probably not be invalidated by the Court.

However, recent cases have been tending to strengthen the rational relationship test by requiring a state to show more than a theory of rationality to support a sentencing classification. Although requiring less than a "compelling state interest" the Court has recently looked for stronger empirical data to prove rationality. See McGinnis v. Royster, 410 U.S. 263 (1973) (upholding good-time credit to a class of pre-trial detainees) and Marshall v. United States, 414 U.S., 417 (1974) (upholding a Congressional scheme excluding from discretionary

rehabilitative commitment addicts with two or more prior felony convictions, on the basis that the aim was the exclusion of those less likely to be rehabilitated).

Lower court cases challenging sentencing decisions on equal protection grounds have consistently failed. See U.S. v. McCord, 466 F. 2d 17 (2d Cir. 1972), Simon v. Woodson, 454 F. 2d 161 (5th Cir. 1972), Meyers v. United States, 446 F. 2d 37 (2d Cir. 1971), Florida ex rel Thomas v. Culver, 253 F. 2d 507, 508, (5th Cir.) cert denied 358 U.S. 822 (1958).

In United States v. McCord, supra, McCord claimed discrimination, contending that he received a one-year sentence as a conscientious objector rather than a year's probation and civilian work because he was not a Jehovah's Witness or a CO due to religious beliefs. Rather, he was a CO on moral and intellectual grounds. The 21 Jehovah's Witnesses sentenced for the same offense had been put on probation and directed to do civilian work by the same court. Nevertheless, the court held that McCord had failed to convince it that there was "a discriminatory sentencing procedure in that court which would bind all judges to follow it in each and every case, and that he had also failed to make any showing that, had he been a Jehovah's Witness, the Judge would have imposed" a lighter sentence.

The dissent, however, wrote that "If the appellant were black and had charged that all whites in his position had been given probation in the court because they were whites, we would give any sentence that sent appellee to jail the 'most rigid scrutiny'".

A report on sentencing practices in the Federal Courts in New York City, by the Committee on the Federal Courts of the Association of the Bar of the City of New York (1973) makes the following points:

Traditionally, the approach of most federal Courts of Appeals to correction of excessive sentences has been to intimate, sometimes none too subtly, that on remand the District Court possibly should grant a motion under Rule 35 to reduce the sentence. As yet, however, reduction of a federal sentence by an appellate court on the ground of disparity has been a rarity. Likewise, in those cases where appellants have sought to show statistically that there was a discriminatory disparity in the court's sentencing policy, their arguments have met with little success. As yet, however, no in-depth study of the sentencing process, giving consideration to all legitimate variables, has been presented in litigation to buttress an equal protection argument about disparity, and that avenue of attack on the problem does not yet appear foreclosed.

This report suggests, then, that an in-depth study of sentencing, giving consideration to all legitimate variables might well buttress an equal protection argument about disparity.

Another area subject to possible challenge is where codefendants in the same criminal charge and with the same degree of complicity receive disproportionate sentences. U.S. v. Wiley, 278 F. 2d 500, (7th Cir. 1960) overturned such a conviction since it was imposed in part for the fact that the defendant had availed himself of his right to trial where the other defendants had pleaded guilty. In this sort of case, the variable legitimate factors are reduced to a

minimum thus increasing the possibility that an equal protection challenge will be successful. Such cases, with a natural control of related variables, do not occur with great frequency, however.

These equal protection challenges relate primarily to existing demonstrable disparity in sentencing that can be shown to derive from other than rational sources of all types. However, the charge of the U.S. Commission on Civil Rights also specifies inequality or "denial of equal protection of the laws because of race, color, religion, sex or national origin." Can we demonstrate, or have there been demonstrations of, consistent bias in sentencing on the basis of "race, color, religion, sex or national origin" that might lead to suspicion of such denial?

Disparity and Discrimination--Speculation and Claims

Certainly, there have been critics who have charged that the criminal justice system operates in a biased manner toward certain disadvantaged members of society. According to this perspective, those underprivileged segments of society such as the poor, the black and other minorities are overrepresented in official crime records and often receive more severe treatment than other similarly situated offenders. Schrag (1971) made the point that:

Criminal sanctions also vary according to other characteristics of the offender, and for any given offense they tend to be most frequent and most severe among males, the young (excepting juveniles handled in the civil courts), the unemployed or underemployed,

the poorly educated, members of the lower classes, members of minority groups, transients, residents of deteriorated urban areas.

In the same vein, much more sharply, Quinney (1970) says that "perhaps the most obvious example of judicial discretion occurs in the handling of cases of persons from minority groups. Negroes in comparison to whites are convicted with lesser evidence and sentenced to more severe punishment."

If Quinney's charge could be supported by evidence, clearly an equal protection issue would have been raised. Schrag, on the other hand, while raising a number of questions seems to confound possible legitimate and possible illegitimate sources of disparity. In both cases, however, as in the writings of many others, we are confronted with intuitive reactions and speculations, but not by adequate empirical data.

Disparity and Discrimination--Research Evidence

When we examine the attempts of social researchers to measure the degree to which discrimination is operative in sentence dispositions, we discover a methodological tangle and contradictory findings.

A fairly typical study of the 1940's was that of Johnson (1941) covering the period from 1930 to 1940. Johnson reviewed the court records of 645 adult homicide offenders in North Carolina, Georgia and Virginia. He concluded that sentencing practices were highly biased against blacks, especially those charged with killing whites. Garfinkel (1949) replicated Johnson's study and attempted to improve it by increasing the sample size by twenty-five percent, including

additional dependent variables and dichotomizing homicide offenses into first and second degree. He, too, concluded that blacks were treated more severely than white offenders.

However, just as this is typical of the findings of studies deriving from the forties and fifties, it is equally typical of the crude methodology that was widely employed in studies of discrimination of those decades. Usually gross comparisons were made of outcome variables of blacks contrasted with a comparable number of whites, without the use of control variables. For example, neither of the studies cited above considered the effects of prior record on sentence outcome. It is quite possible that those with a more serious prior record were treated more severely, and if blacks had more extensive prior records, they would receive more severe sentences.

Another control variable that must be taken into consideration is seriousness of offense. When Bensing and Schroeder (1960) controlled for this variable in analyzing 662 homicides that occurred in Cleveland between 1947 and 1954, they found no evidence of racial discrimination in the handling of the offenders. While it was true that blacks who killed whites were treated more severely in general than whites who killed blacks, the former group (blacks who killed whites) was also more apt to have faced more serious charges, such as homicide while perpetrating robbery or rape.

As studies began to include these control variables, results tended to be more contradictory. The results contributed

no doubt to the conclusion of the committee on the Federal Courts of the Association of the Bar of the City of New York (1973) that:

No study of which we are aware, however, has conclusively documented the thesis that there is disparity in sentencing unrelated to factors which the courts are authorized to consider. In other words, one cannot say with assurance that variations in sentences for the same crime are not due to the variant admixture of factors which judges are legally permitted to take into account at sentencing.

It could even be argued that these conclusions could be drawn regarding some of the more sophisticated studies of the sixties. Bullock (1961) studied the sentence length of 3,644 cases of homicide for the year 1958. While controlling for type of offense, type of plea, prior record and urbanization, his findings supported the existence of differential sentencing practices, but in contradictory directions. While blacks received longer sentences for burglary, they received shorter sentences than whites for murder. Bullock also found that those pleading guilty received shorter sentences than those who did not do so.

Green (1961 and 1964) further refined the methodology of these studies in his study of 1,437 cases dealt with by eighteen judges in the Philadelphia Court of Quarter Sessions. Although a simple breakdown into two groups, black defendants and white defendants, showed that blacks were treated more severely than whites, the differences are explained in major part when one takes into account severity of offense and prior

record as control variables. Green showed, for example, that blacks who had robbed whites were significantly more likely to have been armed than blacks who had robbed other blacks. He concluded that sentencing differences among blacks and whites resulted from actual legal differences in the cases of apprehended offenders, rather than from racial discrimination. (At the same time, Green also concluded that:

as cases move from the extreme of gravity or mildness toward intermediacy, judicial standards tend to become less stable and sentencing increasingly reflects the individuality of the judge.)

At about the same time Vines and Jacobs (1963) found that for the years 1954, 1958 and 1960 in over 4,000 court cases in New Orleans Parish, Louisiana, blacks received significantly longer sentences than whites even when they controlled for severity of offenses committed.

Hindelang (1969) in a review article entitled "Equality Under the Law" tried to sort out the coherent trends in these contradictory findings. He noted that most studies that found evidence of differential sentencing used data from Southern regions of the country and were, on the average, approximately 10 years older than those studies which failed to find evidence of discrimination per se.

Pope (1975) commented that Hindelang's analysis was limited to studies that were conducted before 1965. His own analysis of some studies completed during the decade of

1965 to 1975 leads him to conclude that:

"Although these recent investigations are generally more methodologically rigorous, use more recent data, and include a wider variety of offenses, their findings are still contradictory."

Nevertheless, in the past few years, several studies seem to indicate that in certain regions and circumstances examined there is evidence that race is related to differential outcome. French and Hyatt (1974) found that in North Carolina, while whites account for the majority of felony arrests, blacks are the ones who are adjudicated more harshly, accounting for the majority of incarcerations. Wolfgang and Reidel (1975) reanalyzed a sample of 361 rape cases in Georgia to determine the effect of a death penalty statute enacted by the State legislation after the 1972 Supreme Court decision on capital punishment. Under the provisions of the new statute, which specifies that a death sentence requires the existence of an "aggravating circumstance," these reanalyses attempted to discover what factors, other than race, may have been important in imposing the death penalty. Their results showed that race, and not any of the other nonracial aggravating circumstances, still seemed to be the prime factor in imposition of capital punishment.

Uhlman (1975) in a doctoral dissertation at the University of North Carolina studied dispositions of black and white defendants in "Metro City"--not further identified.

The study focused closely on ethnicity of the judges as well. No significant differences were found between the backgrounds or behavior of black judges and white judges. Discrepancies were found between the treatment of black defendants and white defendants. Both black judges and white judges were harsher on black defendants.

Thomas and Cage (1975) found race one of several variables affecting disposition outcome among juvenile court defendants in an unnamed Virginia locality, even when the type of offense and prior offenses were controlled. With similar and even additional controls, Kulig and Hawkinson (1975) found race to have a significant effect on sentence in Douglas County, Nebraska during the years 1970, 1971, and 1972. Tiffany, Avichar and Peters (1975) examined 1,248 federal convictions for bank robbery, auto theft, interstate transportation of forged securities and miscellaneous forgery. They included among their controls the type of counsel, appointed or retained. Among other factors, race showed some effect on sentencing.

Clarke, et al (1977) reported on a study of Alaska's felony sentencing patterns occurring between August 1, 1974 and August 1, 1976. After taking into account the independent contribution of all other factors in the study, being black in and of itself contributed an estimated 11.9 months to drug felony sentences and 6.5 months to sentences for crimes of theft or unlawful entry. This independent "blackness factor" survived statistical tests and was shown to increase

the severity of sentences entirely aside from such considerations as employment history, educational level, occupation, income, prior criminal history, and probation or parole status.

Hall and Simkus (1975) found that even when controlling for several test factors, native American (American Indian) offenders who appealed before the district courts in a Western state were more likely to receive sentences involving incarceration in the state prison system than were white offenders.

In a dissertation research project by Dison (1976) prisoners incarcerated in the Texas Department for Corrections for robbery were studied to test the hypothesis that the powerless receive more severe criminal sentences than do the powerful. Measures of association and selected control variables were used dealing with characteristics of the victim, circumstances of the crime, and circumstances of legal disposition. The findings tended not to support the class conflict theories of crime, but Dison still reported a finding of a weak relationship between race of the offender and sentence length.

Nevertheless, Chiricus and Waldo (1975) in examining 10,488 inmates convicted for a total of 17 specific offenses in three Southeastern states, found that prior record and some demographic characteristics, when introduced as control variables, explained away apparent differences in sentencing

between social classes. More to the point, Kelly (1976) studying a sample of 2,090 convicts in the Oklahoma penal system, found that race accounted for only 10% of the disparity in sentencing for burglary. That 10% was due to the positive relationship between being black and sentence length. At the same time, race accounted for 30% of the variance in sentences for homicide, but in this case because of a negative relationship between being Indian or Mexican-American. Pope (1976) in a sophisticated study of the sentencing of California felony offenders, found no substantial differences between black and white defendants and sentence length dispensed by lower court judges. For both rural and urban areas, black and white defendants were equally likely to receive the same sentence lengths from lower courts. He noted, though, that rural blacks were substantially more likely than rural whites to be sentenced to a jail term of any length by municipal court judges.

Indications and Implications

What indication do we find in the basis of this array of studies and what possibilities are suggested?

To begin with, the existence of regional disparity has long been acknowledged, and is confirmed. It appears that in some localities and regions, racial factors contribute to sentencing outcomes, and in others it does not. How many regions are in the first category, and how many are in the second is not known.

It is unquestionably so that, during the given period of any study, in a specified locality, region, or even system, racial discrimination in sentencing may be found to prevail. At a subsequent period of time, or during an earlier time period, no evidence of racial discrimination will appear.

Some racial bias operated in a paradoxical direction. In some cases, particularly more recent ones, membership in a specific minority may contribute to the likelihood of getting a more lenient sentence than is meted out to a member of the white majority charged with a similar crime.

Methodological Concerns--Control Variables

All these may be true, but they are difficult to prove. Any suspicion of racial discrimination is difficult to prove conclusively because differential outcomes can be explained, in part, by control variables. Just what control variable should be used in studying these questions, however, remains open to argument. It is a matter of judgment to some extent, although obviously the control variables ought to include those factors that the judge may legally take into consideration in sentencing and is usually presumed to be considering in reaching this decision. These would include several from the list of factors that Wilkins and Carter proposed in a study of factors that probation officers considered in writing presentence reports. They are: the specific offense, prior record, psychological or psychiatric reports, defendant's

statement, defendant's attitude, employment history, age, family history, marital status, medical history, educational background, military history, alcoholic involvement, personal interests and activities, plea, confinement status, and residence data.

Simply put, the control variables utilized must take into account the original charge at the time of arrest, the specific offense for which the defendant was tried, and mitigating factors that may or may not be present. In addition to the offender-related control variables of prior criminal record, there must also be consideration of length of time at risk since any previous arrest or previous sentence, and the number of current offenses.

One problem in deciding just which control variables to utilize is that the choice expresses a philosophy of sentencing. On the one hand, resource variables--residence, income, education, medical history, and even some indicators of pathologies--are class related and some insist that they must be taken into account. Nonetheless, Hewitt (1977) found that for 504 convicted adult felons whose records were kept in the King County prosecutor's office in Seattle, Washington, for the year 1973, resource factors contributed only indirectly to sentencing. The only factor with statistically significant direct effect of any of the sentencing variables was sex of

the offender. (The remaining resource variables had their total effects largely mediated by various intervening variables such as type of offense, prior record, weapon or violence, bail, and the prosecution and probation pre-sentence recommendations.) On the other hand, while it appears reasonable to insist that the original charge and prior criminal record be taken into account, that charge in itself and the prior record may be construed by some critics as additional indications of disparate treatment in the criminal justice system. Thus, some may insist that prior criminal records and the severity of initial charges explain apparently disparate sentencing, and others will counter by arguing that all these factors are part of a continuing pattern of unequal treatment and destiny.

An additional methodological consideration stems from the often cited notion that crimes committed by blacks against blacks are treated with leniency while crimes committed by blacks against whites are dealt with harshly. This notion was, in fact, at the very heart of Green's (1964) study of sentencing in Philadelphia, although Green begins with the premise that an intra-racial crime is more likely to have grown out of an existing relationship so that inter-racial crime is more serious from a legal standpoint. Nevertheless, in several recent studies, it was decided that controls for the ethnicity of the victims are vital to the study of sentence disparity.

What we mean exactly by the contribution of race as a variable to sentence disparity must also be further clarified. In the Wolfgang (1957) Philadelphia homicide study, it was found that the modal or most frequent sentences for black defendants were less severe than the modal sentences of white defendants. Nagel (1967) concluded in his review of state and federal cases for the years 1962-63 that disadvantaged groups (which include the indigent, Negroes and the less educated) received comparatively unfavorable treatment in assault sentencing, but when it came to larceny sentencing, their treatment was favorable as to length of imprisonment.

It follows as well that we must carefully define our criterion, the impact on sentencing, and this is usually done in terms of the length of imprisonment to which the offender is sentenced.

This is a reasonable operational criterion because it is measurable and clear, but it is obvious only a small part of a total picture. The picture also includes the use of the other dispositional alternatives available to the judge and once sentence has been imposed, the actual length of time served, taking into account the impact of minimal and maximal, time earned for good behavior, and the decision of the parole board.

Methodological Concerns--Statistical Treatment

The wide variety of research designs and statistical treatments that have been utilized in the study of sentence

disparity has contributed to the confusion as well. Although it is possible, and even defensible, to study the same phenomenon through comparisons of group means, non-parametric tests such as chi square, product-moment correlational analysis, analysis of variance, regression analysis, factor analysis, path analysis or any of the variants of these methods, the results of the analyses that are performed will have a distinctive shade of meaning that derives from the specific method. Thus, some methods will tell us whether differences between groups are likely to have occurred by chance, others will tell us what variables seem to cluster together, and others will tell us what proportion of the variance in a given factor might be attributed to another factor.

Methodological Concerns--Promising Directions

Some of these problems were overcome by Nagel (1965) who was able to consider data taken from the trial court dockets in a sample of 194 counties in all 50 states. He also reported that "the raw data for the federal cases was taken from the 36,265 federal criminal cases decided in 1963." He also widened his scope to include the various stages in the administration of criminal procedures. It is significant that his study was entitled "Disparities in Criminal Procedure" and Nagel has written extensively on this topic, concluding that significant unwarranted disparity exists. However, while he did include information on economic class, sex, race, age, education, urbanism, region and level of government, Nagel was unable,

because of his data sources, to control for original charge or prior criminal record.

Two positive indications that even problems of the breadth of available data might be conceivably overcome, derive from the Rand Corporation study entitled "Indicators of Justice" (Wildhorn, Lavin, Pascal, Berry, Klein, 1976) and from the even more comprehensive work of Sutton (1976) sponsored by the National Criminal Justice Information and Statistics Service entitled "Criminal Sentencing-Perspectives on Analysis and a Design for Research-Utilization of Criminal Justice Statistics Project." The Rand report is a broad study of performance measurement of criminal justice agencies involved in adult felony proceedings--post arrest through disposition. It was undertaken to identify, screen, and evaluate performance measures estimated from agency records and survey of lay participants as indices of progress.

The National Criminal Justice Information and Statistics Service project is even more ambitious and highly relevant to the consideration of sentence disparity. The author designed an analytic model that enables the comparison of sentencing patterns for different offenses, across different jurisdictions, over time, and for various offender characteristics. Furthermore, whereas most studies have viewed sentencing as involving a single decision, Sutton (1976) distinguishes between the judge's decision about the length of incarceration and his

equally vital determination of whether to incarcerate an offender at all. His proposed research design also employs data pertaining to the type as well as the length of sentence. His appended materials include brief explanations of the 23 independent variables to be used in the analysis. He then utilized his analytical model to study sentencing disparity in the federal court system, with particular reference to regional disparities.

While this study does not take into account state or local court data, it does offer a methodology,--multiple regression analysis, that identifies some of the principal determinants of sentencing that, at best, account for 50% of the total variability in sentencing. While its major focus is not in the area of the effects on race to sentencing, this dimension was considered.

Sentence Disparity in the Context of the Criminal Justice System

The overall conclusion, then, is that there is considerable irrational disparity in sentencing, and that in certain localities or systems during given years there are strong indications that race and sex contribute to this disparity. As the Clarke study in Alaska (1977) demonstrates, even small amounts of disparity deriving from racial considerations can translate into a specific number of months added to a sentence.

Some critics argue that sentence disparity is only one of the many disparities that seem to occur at the various stages of the criminal process, and that disparities in police

discretion, in prosecutorial decisions, or in plea bargaining, are more significant than sentence disparity in producing differential treatment in criminal justice. These arguments, while valid, fail to acknowledge that the other disparities occur in decisions which are not part of the public record except in their effects, and are therefore much harder to document. Some discretion is both more inevitable and defensible at the level of the split-second police decision. The prosecutor's discretion is designed not to be the subject of public scrutiny, because it is related to plea bargaining. The process of plea bargaining carries all the uncertainty of any marketplace, although most bargains become predictable. Sentence disparity, when it occurs, is so stark and incontrovertible that it rankles as a visible symbol of all other real or presumed disparities. The courts, in the person of the judges, should symbolize justice and equity. When the decisions of the court are manifestly unfair and inequitable, or even appear to be so, it is long remembered. This is why interviews with prisoners, even within the federal prison system, yield complaints about disparity in sentencing even before complaints are registered about prison conditions (Yzaguirre, 1977). As Gaylin (1974) says flatly, "Nowhere is inequity likely to be more evident, more costly to the victim, and more infuriating to that group which identifies with him than where there is disparity in sentencing for committing a crime."

Irrational Bias and Discrimination

What relationship, if any, is there between irrational bias and discrimination, the two principal concepts that we have been focusing upon?

Before we answer, we must note that in the most sophisticated studies thus far we have only been able to explain 50% of the variance in sentencing using even the entire range of 80 logically related factors cited by Harries (1976), that half of the variance remains unexplained, and therefore sentencing remains unpredictable. The issue is best set forth by Judge Frankel (1972).

A defendant who comes up for sentencing has no way of knowing or reliably predicting whether he will walk out of the courtroom on probation, or be locked up for a term of years that may consume the rest of his life, or something in between. (The current situation) is a wild array of sentencing judgments without any semblance of the consistency demanded by the ideals of equal justice.

No matter what the source of this unpredictability, this irrationality, it poses a major civil rights issue in itself. We must acknowledge, though, that since race and sex are among the variables that most studies include in gauging the explained variance in sentencing, it is illogical to assume that they are also major sources of the unexplained variance. Nevertheless, there are some who sharply suggest a link, by an indirect route. Howard (1975) notes that the orientation, attitude and action base of judges is influenced

by history and social climate. Because of this, he claims, any examination of sentencing disparity should begin not with the judge, but with society itself. In our society, Howard asserts, some citizens are seen as human, and some as "less than human," as deserving of less. Some people are deemed not to "belong" because of perceived social or cultural deficits. Also, society has a tendency to punish people whom it regards as a threat to the system. Howard traces these mechanisms as social conceptions which can be translated into judicial behavior and adversely affect the quality of justice. Although Howard's argument undoubtedly clarifies the operation of race as a factor in sentencing, it is less clear that it illuminates the unexplained variance in sentencing. If these social conceptions operate as Howard described them, they might be mediated through what Gaylin describes as the personal system of each judge. Gaylin (1974) says that each judge has his unique personal view of the severity of certain crimes and of the capacity for rehabilitation of certain individuals. Consistency then is to be found within a judge's decision, provided that the individual judge will elucidate his philosophy of sentence, his hierarchy of crimes, and his ideas on rehabilitation. Gaylin does not expect consistency or predictability between judges or across courts. Gaudet's (1949) study would seem to support this explanation for he and his colleagues investigated the sentences imposed on 7,638 cases over ten years by six

separate judges in a New Jersey county court. Since the cases were assigned to each judge on a rotational basis, he concludes that the different types of offense and offender would be randomly distributed between judges. In general, judges A and F were more lenient than the others--they imprisoned about a third of the offenders--while the other judges imprisoned half or more. Unfortunately, Green correctly criticized Gaudet's study on the basis of the fact that the presumption that the judges had similar cases was unproven. Hood and Sparks (1970) have also criticized a study of disparity among Israeli judges reported by Shoham (1959) on precisely the same grounds. Although Shoham demonstrated significant disparity between eight judges in three district courts, his conclusion that judges A, N, and D have different policies for offenses against property and against the person, relative to the other judges, is unwarranted. Hood and Sparks point out that "apparently three of the eight judges received only about thirty cases each and it therefore seems hard to justify the assumption that offenders of different types were evenly distributed between them." Shoham himself refers to the "personal attitude of the judge and his individual sentencing habits" as a "marked influence on the severity of punishment." But he goes on to call it "this indefinable element," and says that it "may play a more important role in determining the type and severity of sentence than the nature of offense

and the personality of the offender." Although Hood and Sparks correctly wrote that, once again the unexplained has been given no explanation at all, it is interesting to observe that Shoham's speculations appear to be confirmed by later studies that attempt to apportion both the explained variance and the unexplained variance.

Regretably, we can also suggest that it may be that even individual judges show limited consistency, for their decisions are influenced by their sources of information about the cases, and about the tenor of general social concern about a category of cases or offenders.

The Impact of Irrational Disparity

There is another aspect of irrational disparity that links it to discrimination, and that is in its impact. The proportion of minority members among those who commit crimes is difficult to estimate, but on the basis of solid evidence, it is less than the proportion of minority members found among those convicted and sent to prison (Geis, 1965; Wolfgang & Cohen, 1970).

Attempts have been made to conduct a regular ethnic census of the inmates of jails and correctional facilities, but thus far only advance reports have been published. In a survey of inmates of local jails in 1972 that was released in 1973, there were 3,921 jails estimated holding 141,600 inmates, 95% of whom were male. The ethnic breakdown found 56% whites, 42% blacks, and 2% other minorities.

In the advance report on the survey of inmates of State Correctional Facilities in 1974 (SD-NPS-SR-2, March 1970) 191,400 inmates were counted, of whom 98% were sentenced. This survey found that 51% were whites, 47% blacks, and 2% others. If we consider also that for both groups approximately 25% were in the 21-24 age group, and that 75% were between the ages of 18 and 34, the impact problem becomes obvious in its ramifications. Whatever the reasons may be for the ethnic proportions among inmates, any inequity in the criminal justice process must impact most strongly on those who make up a large part of the population. To the extent that blacks, and possibly other minorities (although this is not clear), are disproportionately represented in the inmate population, not only are they the victims of inequity, but knowledge of inequity pervades their subculture, breeding both cynicism and politicization. From a social perspective, we must be concerned about the general problem that of an estimated 12.5 million black males between the ages of 18 and 24 in the total population in 1972, the combined number of those incarcerated in local jails, state correctional facilities, and federal prisons can be estimated at between two and three percent of the total group. While this age cohort will decline in the general population during the next decade, it may not do so for the minority population.

The Call for Remedies and Reform

Even on the basis of the mixed evidence, but certainly inspired by the unequivocal evidence of intolerable disparity in federal sentencing, the call for both remedies and reform has been sounded during the past two years. In an issue of *Judicature* in December 1976, there were articles that expressed various aspects of this call. Senator Edward Kennedy (1976) reviewed the total absence of any prescribed guidelines to aid judges in sentencing and articulated the provisions of a proposed Senate reform bill, the Sentencing Guidelines Bill (S. 2669 94th Congress 2d Session). Senator Kennedy's article goes on to discuss a host of other remedies as well, and also discusses the purposes of incarceration. Dean Robert McKay (1976) contributed an article, entitled "It's Time to Rehabilitate the Sentencing Process," which is a sharp, critical analysis of the existing sentence structure and its effects. Kress, Wilkins and Gottfredson (1976) wrote to ask, "Is the End of Judicial Sentencing in Sight?" They expressed an opinion that reform should be gradual, rather than sweeping, and consequently they presented a model of use of sentencing guidelines.

While most of these calls and recommendations reached a crescendo during the past few years, the specific remedies suggested stem from the 1967 President's Commission on Law Enforcement and Administration of Justice Task Force Report

on the Courts: Chapter 2, Sentence and on Corrections; Chapter 3, Probation; and Chapter 6, Parole. They were set forth in the 1973 National Advisory Commission on Criminal Justice Goals and Standards, Report on Correction, in which Chapter 5 is on Sentencing. In 1968, there was a report by the American Bar Association Project on Minimum Standards for Criminal Justice, entitled Sentence Alternatives and Procedures, and a subsequent report was entitled Appellate Review of Standards.

These reports describe in appropriate detail some of the remedies and reforms which should be applied to the sentencing process.

At the time of the writing of this report, in December of 1977, there is pending before the Senate a heavily reworked version of last year's S.1, a recodification of federal criminal laws. In this year's bill, S. 1437 (which has been approved by the Senate Judiciary Committee and is expected to be considered by the full body early next year) there are found several of the reforms in sentencing that have been proposed, including the establishment of a sentencing commission which would develop guidelines to provide direction for federal judges. The Washington Star (1977) commented editorially:

There is a growing mood of pragmatism rather desperately arrived at--in criminal sentencing. While the debate and the research continue, those with responsibility for containing criminality are more and more inclined to endorse such procedures as determinate sentences and the junking of parole.

Proposed Remedies--Limiting Judicial Discretion

This remedy also subsumes what is sometimes termed "determinate," "definite" or "flat" sentences. Rubin (1955) points out that there really is no such thing as either a determinate or indeterminate sentence. There are sentences with wide or narrow ranges between the minimum or maximum term, with fixed minima, fixed maxima or both, but these do not constitute indeterminacy. Similarly, even flat time sentences do not mean that it has been inexorably determined that the individual will serve a precise number of years, months and days. Parole, "good time" and other earned time considerations cloud this picture and add ambiguity.

Despite the semantic fuzziness, there is a decided movement toward limiting judicial discretion with regard to the range of terms that can be meted out to persons convicted of a given crime. Poster et al (1976) did an analytic review of the proposals for definite sentencing in four states and defined definite sentencing as providing "for definite terms of imprisonment to be selected from narrowed sentence ranges as one of the many sentencing options (diversion, probation, restitution) available to judges." The legislative approach to definite sentencing was adopted by Illinois in November 1977 and is under consideration elsewhere. Under this approach, the legislature fixes the penalty statutorily, with limited allowance for judicial discretion in the case of aggravating

or mitigating circumstances. The judicial approach leaves greater discretion, but establishes a statutory maximum, and has been adopted in the State of Maine. The administrative approach, utilized in part by Minnesota and California, narrows discretion by establishing definite parole release dates within specified ranges according to the offense and designated characteristics of the offender. The study also considers the amount of discretionary latitude that should be possessed by a sentencing authority, potential support and opposition factors for each of the three approaches, and potential implications of definite sentencing. In his book, Prisons--Houses of Darkness, Orland (1975) wrote that current radical approaches to changing the system calls for abolishing indeterminate sentences and parole. "Precise sentences, the maximum being five years, would be predetermined according to the seriousness of the offense. Rehabilitation must be accomplished during this time or, unless a compelling need for further confinement could be demonstrated, the prisoner would be released." Von Hirsch (1976), in his book Doing Justice, elucidated this very argument. Theories about sentencing, he wrote, have long been dominated by traditional assumptions--that prisons rehabilitate the criminal or restrain him if he is dangerous, and that to accomplish this judges and other officials should be given the widest discretion in their decisions. His text pointed out the flaws in this reasoning by documenting the failures of rehabilitation and the futility of predicting recidivism.

An interesting objection to this approach is found in the McAnany (1976) article in *The Chicago-Kent Law Review* where the implications of definite sentence on the correctional system is analyzed, including the potential problems in institutional discipline, grievance procedures, and even the size of the prison population. Yet, withal, the authors propose alternatives that they consider critical for improvement over the existing structure.

In the April 1977 issue of *Crime and Delinquency*, a symposium is presented in which John Manson (1977), Commissioner, Connecticut Department of Correction, calls for flat sentences and a number of respondents comment on his proposal. He states that flat sentences, with unconditional discharge at its expiration, would invite the prisoner to participate in rehabilitative programs if he was genuinely interested in them, not because he wanted to impress the parole board. Manson links flat sentences with the abolition of parole. Most respondents agree with Manson, particularly Leslie Duvall, an Indiana State Senator, who finds this approach in step with the philosophy of the new criminal code for Indiana adopted July 1, 1977. (California adopted a new code with greater determinacy on the same date.) A Montana State Senator, Thomas Towe, writes "that Montana never had indeterminate sentences." Yet some scholar respondents wonder whether all the implications and effects of this model have been anticipated, and these cautions deserve attention.

Proposed Remedies--Sentencing Guidelines

In several states and localities, the use of sentencing guidelines, sometimes including average sentence tables, have been developed and adopted. This more moderate approach has been proposed by Enschede (1975), a distinguished Dutch criminologist, and its operation in district courts in Portland Oregon is described by Evans and Gilbert (1975). Essentially, parts of this remedy are found in the new federal legislation now being considered, and this approach has been advocated by Senator Kennedy (1975). The moderate quality of this remedy lies in the fact that the only limitation of judicial discretion that it imposes is that knowledge of average sentences for specific crimes be available to judges. Whether judges will consult these averages, and, more important, whether they will be at all influenced by them is open to speculation.

Proposed Remedies--Comprehensive Presentence Services

The principal effect of an expanded comprehensive presentence service is to provide alternatives to the courts. It usually implies expanded probation services, which are still more limited than many might imagine. While probation for juveniles was available in every state by 1925, it was not until 1956 that this was true of adult probation. As a result, within states there are many counties and localities that still have no probation service available.

In the 1968 President's Commission report on probation, there is mention of one state in which "only two counties have probation services."

There has been some expansion of these presentence services through the Interstate Compact for the Supervision of Probationers and Parolees, in which probationers are able to return and be supervised by agencies in their home states after being adjudicated criminal or delinquent elsewhere. Diciover and Durkee (1974) describe an option of presentence services developed in California. Their report, while claiming that these services provide better focused guidance for sentencing, found significant disparity in the patterns of recommendations between the Northern and Southern guidance centers. This discouraging problem confirms the findings of Carter (1969) that "widespread variation exists between individual probation officers and individual judges."

From quite another perspective, Dash (1972) and others have argued that an expanded role for the attorneys, prosecution and defense in conferring with the judge before sentence might eliminate irrational disparity.

The question remains, however, whether the involvement of additional people, probation officers, lawyers and others, may not introduce additional sources of irrational disparity.

However, it is clear that proposals for more rigorous standards for presentence reports, including

content specification, the early preparation of the presentence report prior to adjudication and expanded disclosure of the presentence report, as proposed by the National Advisory Commission on Criminal Justice Goals and Standards (1973), would all serve to minimize irrational disparity.

Proposed Remedies--Sentencing Panels

In the Dickover and Durkee (1974) article, one of the remedies adopted in California and in other states are sentencing panels. Three or more judges meet as a panel to consider what sentence should be given in each case, thus sharing expertise and diminishing idiosyncratic approaches. Evans and Gilbert (1975) also recommend this approach to sentencing judges. While the benefits of achieving consensus are obvious, the responsibility for the sentence remains that of a single judge, in most cases, and room for irrational disparity still exists. Even if the consensus were to be the binding decision, it would be somewhat less subjective, but still far from wholly objective.

Proposed Remedies--Sentence Review

Legal scholars, including Judge Frankel (1974), have agreed with the anonymous author of the article (1973) on "Appellate Review of Sentences" in the Duke Law Journal that "adherence to the rule against sentence review has

occasionally resulted in clearly excessive but unchallengable sentences and in unjustified disparity in punishment for similar crimes." Korbake (1975) reported on the results of an American Judicature Society survey on sentence review at the state level:

The survey determined that judges have the power to review the propriety of legal sentences in 23 states. Four have obtained this power through case law; one through the use of its rule-making power; twelve through statutory enactments authorizing appellate review of sentences, and seven through the creation of panels of trial court judges to review the propriety of the sentences imposed at the trial court level. Three states, New Mexico, Utah and West Virginia considered the survey inapplicable to their state in view of their strict indeterminate sentencing statutes. The State of Washington is listed as undecided since no case law has been found interpreting the court rule which appears to authorize the review of sentences. Twenty one states do not allow review of legal but excessive sentences.

The author of the Duke Law Journal article (1973) makes the bold statement that the federal courts have increasingly avoided the rule against sentence review.

Given the apparent breadth of these judicially developed avoidance techniques, it can probably be said that an appeals court now has ample precedent for the review of any sentence it considers outrageous. Among the techniques employed to review sentences are: a review on due process or procedural grounds; reviews on the grounds of protecting the defendant's privilege against self-incrimination; review to enforce sentencing statutes;

exercising supervisory control; and reviewing abuse of discretion. It is stated that access to serious review is dependent upon the existence of a reviewable record. At present, a sentencing judge is usually not required to disclose to the defendant or to an appeals court either the presentence report or the judge's grounds for a particular sentence. The author contends that this freedom to operate in secret, if at all justifiable, accords only with a system where sentencing decisions are not reviewable. If sentences may be subjected to appellate scrutiny, the compilation of a reviewable record of the sentencing decisions would appear to be mandated.

In the proposed new federal criminal code, there is provision both for appellate review of sentences and for a reviewable record. The specifics are similar in nature to models described by Strauss and Baskin (1976) that were utilized by the Federal Clemency Board in response to uneven treatment of draft offenders by federal judges.

Review would be a major corrective, but it has not always eliminated the subtle effects of bias widely shared in society although unjustified.

Proposed Remedies--Other Suggestions

Many other remedies have been proposed, including orientation of new judges, regular visitation of facilities, improved communication between judges and correctional authorities, feedback systems on outcomes of sentences, sentencing institutes, continued jurisdiction of the sentencing court, and others. None of these remedies in

themselves carries claim to do other than ameliorate disparity. These remedies are very moderate, because they do not produce systematic change.

Proposed Remedies--Evaluation

The National Advisory Commission on Criminal Justice Goals and Standards (1973) pointed out that these ideas for reform had been proposed during the decade earlier in three major works:

In 1962, the American Law Institute, after a decade of study of the criminal justice system, proposed a 'model penal code,' part of which suggested ways out of the sentencing morass. In 1963, the National Council on Crime and Delinquency published its 'Model Sentencing Act.' Finally, between 1966 and 1970, the American Bar Association produced a number of significant publications in its Project on Minimum Standards for Criminal Justice.

Despite all these suggestions and efforts, alteration of the current system has been "slow and arduous," the Commission concluded.

Some of the proposed remedies would seem to offer immediate amelioration. There is reason to suspect, however, that other unanticipated effects would also result from the move to these remedies.

Alternates Available to the U. S. Commission on Civil Rights

Under its charge, the U. S. Commission on Civil Rights is clearly concerned with sentence disparity. This concern must be heightened both by the slow progress being made toward any kind of remedy and because there is still

so much that is not known about the possible discriminatory effects of sentence disparity. There are several courses of action that the Commission could undertake, including launching studies of the problem on a national or regional basis, conducting factfinding hearings, conducting consultations with experts in this field, holding open meetings on a regional basis under the aegis of the regional advisory boards, calling for a Presidential Commission on Sentencing (as recommended by Judge Frankel, 1972), calling upon other agencies of government at the federal or state level to address themselves to this problem, or any combination of these options.

Study Possibilities

While there are some hopeful indications that they can be overcome, the methodological problems in conducting valid studies of disparate sentencing are still formidable. The essential point is that a credible study must include the relevant control variables that have been identified and that a responsible study must choose variables that reflect a balanced underlying philosophy of criminal justice. The difficulty encountered thus far in attempting to use control variables appropriately is that the base data for many of these variables are found in sources other than the data banks used by the court systems. In many states and localities, the data are simply not stored in any single place, and the attempt to use several data sources makes any study cumbersome and

expensive. On the federal level, this problem has been overcome and there are indications that it can be overcome at the state and local level as well.

The methodological issues, conceptual issues and scope of any such study, even on that proceeds on a sampling basis, appear to require that the Commission proceed carefully, consult widely with experts, and perhaps collaborate with other governmental agencies in order to bring to bear an appropriate range of resources. A study, however, could produce a definitive picture that would be an important stimulus to reform and that would, at this time, provide a model to be used by states, localities and systems to monitor their performance.

Factfinding hearings appear to be less appropriate, for the information that is required is not the private knowledge of individuals who might be subpoenaed to appear and testify. Those with factual information about discrimination implicit in disparate sentencing will freely testify. Those who participate in systems in which this is an unacknowledged effect of the process will have little or no conscious knowledge to communicate, for it is in these systems that records are spotty and results have not been scrutinized to determine either the extent of irrational disparity or of discrimination in sentence disparity.

Consultations with experts should be extremely

helpful to the Commission both in focusing attention on this very serious and intolerable problem and on charting both future action and Commission positions on remedies that are currently being proposed.

Open meetings would serve some of the same purposes, but it must be remembered that sentence disparity is not only a reality of the courtroom, but is also the widely condemned pervasive irritant among the minorities and the poor who suffer as a result of it. If public open meetings serve to fan these resentments without rapid movement thereafter to remedies, then the meetings will have caused harm. The public at large knows in a vague way that sentencing is disparate. Those who identify with the victims of this disparity know of specific cases, but not of the general picture. It is possible that it may be salutary for groups who believe that they have been singled out for invidious discriminatory treatment to participate in open meetings where others can express their concerns as well.

There are some who may claim, at this point in time, that the impending federal legislation(S. 1437) and the legislative changes just made by several of the states will, in themselves, provide a solution to the problems of sentence disparity. This is still questionable, both because there are many states and localities in which considerable judicial discretion is exercised and because

the remedies contained in these current legislative efforts are still untried, and we simply do not know what their effects will be. Nevertheless, there has been sufficient progress, or promise of progress, to obviate the need that Judge Frankel (1972) expressed for appointment of a Presidential Commission to examine sentencing in the federal system.

The proposed reorganization of the Law Enforcement Assistance Administration recently announced by Attorney General Bell calls for a broadening of the agency with a National Institute for Justice. Whether or not this specific reorganization plan is adopted, the thrust presented suggests that the Department of Justice might be an appropriate collaborator in efforts to deal with inequity in sentencing. Both the Assistant Attorney General for Civil Rights and the Assistant Attorney General for Improvements in the Administration of Justice might well be involved in planning steps to be taken in coming to grips with the problem.

Summary

The full extent of sentence disparity in the courts of our country is not known, but there is ample evidence that substantial disparity exists and that much of it can neither be explained or justified. The evidence with regard to discrimination as a factor in this disparity is mixed and

difficult to fathom because of tangled methodology and methodological issues. However, there is solid evidence from certain states or localities that race or sex contributes in some small part to the variance in sentencing, thus adding months to individual sentences. Moreover, the impact of general, irrational disparity impacts heavily on minority members who become involved with the criminal justice system. There are several remedies that have been proposed, and some have recently been enacted in a few states, but generally remedial progress has been slow and halting. There is reason to believe that an equal protection challenge could now be mounted, especially if there were an adequate base of supporting data. It is concluded that the U. S. Commission on Civil Rights has several alternatives for action available to it, possibly in concert with other governmental agencies, and that it has both the authority and obligation to act in this area.

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